(17) (17)

Nos. 06-340, 06-549

FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FEDERAL WATER QUALITY COALITION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL P. ALBERS
Counsel of Record
FREDRIC P. ANDES
DAVID T. BALLARD
BARNES & THORNBURG
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606
(312) 357-1313

Counsel for the Federal Water Quality Coalition

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Ninth Circuit's Interpretation Of ESA § 7(a)(2) Substantially And Adversely Undermines The Well-Established NPDES Program In Direct Conflict With The Plain Language And Congressional Intent Of The CWA. 6

II. ESA § 7(a)(2) Does Not Override The Authority Of Federal Agencies To Perform Their Mandatory Statutory Duties. 16

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases:

American Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998) 6, 8-9, 10

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 7

Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) 2, 3, 11

Defenders of Wildlife v. EPA, 450 F.3d 394 (9th Cir. 2006) 4, 5, 17

Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53 (D.D.C. 2003) 20

Edmond v. United States, 520 U.S. 651 (1997) 10

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 7, 12

J. E. M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc. 534 U.S. 124 (2001) 9

Morton v. Mancari, 417 U.S. 535 (1974) 9, 21

National Cable & Telecommunications Assoc. v. Gulf Power Co., 534 U.S. 327 (2002) 10

Oregon Natural Resources Council v. Hallock, No. 02-1650-CO, 2006 U.S. Dist. LEXIS 87070 (D. Or. Nov. 29, 2006) 11, 16

Cited Authorities

Page

Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992) 6, 9

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) 20

South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 6-7

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997) 20

United States v. Borden Co., 308 U.S. 188 (1939) ... 21

Statutes:

16 U.S.C. § 1536(a)(2) 2, 13, 16

29 U.S.C. § 651(b)(11) 20

29 U.S.C. § 667 19

29 U.S.C. § 667(b) 20

29 U.S.C. § 667(c)(1)-(8) 20

33 U.S.C. § 1251 1

33 U.S.C. § 1251(a) 6, 7

33 U.S.C. § 1251(b) 3, 8, 12

33 U.S.C. § 1251(d) 9

Cited Authorities

Page

33 U.S.C. § 1311(a) 6

33 U.S.C. § 1342(a) 4, 6, 8, 15

33 U.S.C. § 1342(b) 1, 7, 8

33 U.S.C. § 1342(c) 4, 7

33 U.S.C. § 1342(c)(2) 8

33 U.S.C. § 1342(c)(3) 8, 10, 11

42 U.S.C. § 6926(b) 17

42 U.S.C. § 6926(d) 17

42 U.S.C. § 6926(e) 17

42 U.S.C. § 7661a(d)(1) 18

42 U.S.C. § 7661a(d)(3) 18

42 U.S.C. § 7661a(i)(1) 18

42 U.S.C. § 7661a(i)(2) 18

42 U.S.C. § 7661d(b)(1) 19

Regulations:

40 C.F.R. § 123.25(a) 8

Cited Authorities

Page

Other Authorities:

Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control, Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 92nd Cong. 4356 (1971) 12-13

Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2005) 15

See In re: Indeck-Elwood, L.L.C., PSD Appeal No. 03-04, slip op. (Environmental Appeals Board, Sept. 27, 2006) 19

John H. Minan, *General Industrial Storm Water Permits and the Construction Industry: What does the Clean Water Act Require?*, 9 CHAP. L. REV. 265 (2006) 13-14

Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995) 12

S. COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 92-414 (1971) 12

INTEREST OF *AMICUS CURIAE*[1]

The Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (33 U.S.C. § 1251, *et seq.*) (the "CWA").[2] Coalition member entities or their members own and operate facilities located on or near waters of the United States. These entities operate pursuant to individual or general National Pollution Discharge Elimination System ("NPDES") wastewater or stormwater permits, which were issued by EPA or, if EPA has transferred permitting authority pursuant to section 402(b) of the CWA, 33 U.S.C. § 1342(b) ("CWA § 402(b)"), by state water quality agencies. The Coalition previously filed a brief in support of the petitions for writs of *certiorari* in this case.

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, the Coalition states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the Coalition, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] Consent by all of the parties in this case has been given to the Coalition for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The United States Environmental Protection Agency ("EPA") has provided specific written consent to the Coalition to file this brief. The Coalition submits EPA's consent letter to the Court concurrent with its filing of this brief.

The Ninth Circuit decision below interpreted section 7(a)(2) of the federal Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA § 7(a)(2)"), as imposing an additional requirement on CWA § 402(b) transfer decisions that is not contained in the CWA. This new requirement, if left to stand, would directly and adversely affect the administration of the NPDES permitting program as it is applied to Coalition members. In light of the substantial impact this case will have on its members, the Coalition has a direct interest in maintaining the current, well-established NPDES program, which will be undermined if the Ninth Circuit decision is not reversed.

SUMMARY OF ARGUMENT

The Ninth Circuit decision allows ESA § 7(a)(2) to override EPA's mandatory duty to transfer NPDES permitting authority to the states under CWA § 402(b), in direct conflict with the language and Congressional intent of the CWA. CWA § 402(b) states that EPA is required to transfer NPDES permitting authority to a state if that state can demonstrate that its program will meet the nine criteria contained in CWA § 402(b)(1)-(9). There is no dispute that the State of Arizona met the nine required criteria under CWA § 402(b). *Defenders of Wildlife v. EPA*, 420 F.3d 946, 963, n. 11 (9th Cir. 2005). The Ninth Circuit, however, ruled that pursuant to ESA § 7(a)(2), EPA must also insure that any action to transfer NPDES permitting authority to a state under CWA § 402(b) is not likely to jeopardize the continued existence of any endangered species. *Id.* at 967. In vacating EPA's transfer approval, the Ninth Circuit held that EPA failed to comply with ESA § 7(a)(2) in transferring NPDES permitting authority to the State of Arizona, as evidenced, according to the court, by the mere fact that Arizona, as a state agency, is

not required to comply with the consultation requirement of ESA § 7(a)(2). *Id.* at 971.[3]

The Ninth Circuit decision cannot stand because it writes a superseding requirement into CWA § 402(b), contrary to EPA's obligations under the plain language of that statute. As a result, the Ninth Circuit decision could have a broad and unjustified effect on EPA, state agencies, and the entities they regulate, including Coalition members, without any indication from Congress that such an effect was intended, or is warranted. The Congressional intent behind the NPDES program, as well as the CWA generally, is to allow the states to take a primary role in the regulation of pollutant discharges to their waters. 33 U.S.C. § 1251(b). The Ninth Circuit's disregard of that intent undermines the well-established system that has resulted in the mandatory EPA transfer of NPDES permitting authority to 45 states over the last 33 years.[4]

According to the Ninth Circuit, in order to maintain their NPDES permitting authority, states must strictly comply with ESA § 7(a)(2) to insure that state actions are not likely to jeopardize endangered species. Accordingly, for current state programs to avoid a withdrawal of NPDES authority, or for new state applicants to obtain a transfer of authority pursuant to CWA § 402(b), states would apparently be required to

---

[3] The Ninth Circuit specifically held that "the EPA's transfer decision will cause whatever harm may flow from the loss of *section 7* consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis in original).

[4] The first state that EPA transferred NPDES permitting authority to was California on May 14, 1973. *See* National Pollution Discharge Elimination System (NPDES): Specific State Program Status (last visited February 16, 2007) <http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific>.

adopt burdensome mechanisms to implement the requirements of ESA § 7(a)(2), despite that section's facial applicability only to federal agencies. The Ninth Circuit decision could require EPA to revisit its CWA § 402(b) transfer decisions, and withdraw approval of state NPDES programs, regardless of independent state efforts to protect endangered species, if full state compliance with the requirements of ESA § 7(a)(2) cannot be demonstrated. 33 U.S.C. § 1342(c). Broad withdrawal of state NPDES authority would have serious practical implications for federal and state agencies and the regulated community. For example, EPA would be burdened by the return of permitting authority and would have its resources exhausted by the increased volume of new permitting decisions, potentially leading to burdensome delays for regulated facilities seeking permits.

The Ninth Circuit decision would also unreasonably override the authority of EPA, as well as all other federal agencies, to satisfy their numerous mandatory obligations outside of CWA § 402(b). Because there is no indication that the Ninth Circuit limited its interpretation of ESA § 7(a)(2) to the NPDES delegation context only, EPA would apparently be required, by the logic of the decision, to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (collectively, the "ESA Services") before performing numerous other mandatory duties under the CWA and other environmental statutes. Moreover, all other federal agencies would also be required to consult with the ESA Services before acting under non-environmental statutes, as recognized by the dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394,

399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The extensive effects of the Ninth Circuit decision cannot be overstated.

If broadly applied, the Ninth Circuit decision would cause substantial and unwarranted changes in the administration of the NPDES program, contrary to the language of the CWA itself, as well as its underlying Congressional intent. The Ninth Circuit decision should be reversed.[5]

---

[5] In granting the petitions for writs of *certiorari*, the Court requested that the parties brief and argue an additional set of issues: whether the Ninth Circuit correctly found that EPA's transfer decision was arbitrary and capricious, and if so, whether the Ninth Circuit should have remanded on that basis without interpreting ESA § 7(a)(2). The Coalition believes that the Ninth Circuit decision was in error in finding that EPA's transfer decision was arbitrary and capricious. However, the Coalition does not think that the Court should decide this case on that basis. Instead, the Coalition believes that the issue of the Ninth Circuit's interpretation of ESA § 7(a)(2) is ripe for the Court's review and should be decided at this time. If a remand to EPA is ordered, EPA would again transfer NPDES permitting authority to the state of Arizona, as EPA and the ESA Services both agree that ESA § 7(a)(2) cannot overrride EPA's nondiscretionary duties under CWA § 402(b). *See* EPA App. to Pet. for Writ of Cert., at 93a-116a. Assuming Respondents again seek review of EPA's transfer decision based on an alleged failure to comply with ESA § 7(a)(2), the Ninth Circuit would likely interpret the parameters of ESA § 7(a)(2) consistent with its previous decision below. Again assuming that the non-prevailing parties pursue a petition for writ of *certiorari* to the Court after the Ninth Circuit's second interpretation of ESA § 7(a)(2), the Court would be faced with the same statutory interpretation issue before it now.

Instead of remanding the case, which would most likely return to the Court at a later time for an interpretation of ESA § 7(a)(2) in relation to CWA § 402(b), the Court should review that issue at this time. If the case were remanded, it would take some time – months

(Cont'd)

ARGUMENT

I. THE NINTH CIRCUIT'S INTERPRETATION OF ESA § 7(a)(2) SUBSTANTIALLY AND ADVERSELY UNDERMINES THE WELL-ESTABLISHED NPDES PROGRAM IN DIRECT CONFLICT WITH THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE CWA.

1. The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits any person from discharging any pollutant into the waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). Section 402 of the CWA ("CWA § 402") authorizes EPA to issue NPDES permits for the discharge of pollutants, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a). As described by the Court, "[g]enerally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Water*

(Cont'd)

if not years – to return to this Court. During that time period, federal and state agencies and the regulated community would be left in a state of confusion as to whether ESA § 7(a)(2) applies to the NPDES program – and all other EPA-administered programs – as stated by the Ninth Circuit in *Defenders*, or whether it applies as stated by the Fifth and D.C. Circuits in *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992). Such confusion will lead to uncertainty and inconsistency in administering water programs under the CWA and other acts administered by EPA (in addition to other Federal programs administered by other agencies). Therefore, the Court should address the ESA § 7(a)(2) interpretation issue now.

Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).

The CWA also recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'")). To this end, CWA § 402(b) mandates that EPA transfer to states the authority to implement and administer the NPDES permit program, if a state can meet the nine requirements in sections 402(b)(1)-(9) of the CWA. 33 U.S.C. § 1342(b) ("The Administrator **shall approve** each such submitted program unless he determines that adequate authority does not exist . . . .") (emphasis added). If a state seeks a transfer of NPDES permitting authority from EPA, the governor of such a state "may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1342(b). Once a state elects to implement its own program, and EPA approves such "submitted program" under the criteria of CWA § 402(b), state programs can issue permits that insure compliance with the CWA. *Id.* Moreover, once a state permitting program is established, EPA will cease to administer the NPDES program in the state's jurisdiction and "shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless [EPA] determines that the State permit program does not meet the requirements of subsection (b) of this section . . ." 33 U.S.C. § 1342(c).

Once EPA transfers NPDES permitting authority to a state, the state program "shall at all times be in accordance

with" section CWA § 402. 33 U.S.C. § 1342(c)(2). Moreover, state programs are required to implement EPA's NPDES regulations. 40 C.F.R. § 123.25(a) ("All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each . . ."). EPA has a continuing duty to determine whether a state program is in compliance with CWA § 402. 33 U.S.C. § 1342(c)(3). If EPA determines that a state is not complying with CWA § 402 in administering its NPDES program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, . . . the Administrator **shall** withdraw approval of such program." *Id.* (emphasis added). The permitting authority for that state then reverts to EPA under CWA § 402(a). 33 U.S.C. § 1342(a).

Since 1972, when CWA § 402(b) was enacted, 45 states, including Arizona, have invoked that statute to require EPA to transfer NPDES permitting authority. *See* footnote 4, *supra*. In addition, the State of Alaska has indicated in an *amicus curiae* brief that it formally applied for a transfer on June 29, 2006 and is in the process of seeking approval from EPA as the 46th state to obtain NPDES permitting authority. In other words, for more than three decades, EPA and the states have jointly employed CWA § 402(b) to satisfy "the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of [the CWA]." 33 U.S.C. § 1251(b).

2. Despite the clear intent of the CWA, the Ninth Circuit decision subverts the system that has been implemented by EPA's repeated transfers of NPDES permitting authority to the states. Under CWA § 402(b), EPA has a nondiscretionary duty to transfer its NPDES permitting authority if a state is able to demonstrate that its permitting program complies with the nine requirements of CWA § 402(b)(1)-(9). 33 U.S.C. § 1342(b); *see also, American Forest and Paper Assoc. v.*

EPA, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements."). There is no indication in the plain language of CWA § 402(b), or the CWA generally, that EPA approval of a transfer is subject to any other requirements. In interpreting the two statutes at issue, CWA § 402(b) and ESA § 7(a)(2) should be interpreted to coexist peaceably. *See J. E. M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.* 534 U.S. 124, 143 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("Indeed, 'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"). To coexist with CWA § 402(b), ESA § 7(a)(2) cannot be read to expand EPA's power to deny a permitting authority transfer based on an assessment of the effect on endangered species, because that power is expressly limited to the nine criteria enumerated in CWA § 402(b)(1)-(9). Instead, ESA § 7(a)(2) should be read to require consultation regarding endangered species only where possible within the existing authority of EPA under the CWA. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) ("As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.") (emphasis in original); *American Forest and Paper Assoc.*, 137 F.3d at 299 ("We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.") (emphasis in original). This is the only sensible interpretation of the two statutory provisions, because any other reading would prevent EPA from carrying out its nondiscretionary duties consistent with the plain language of the CWA, which EPA is required to do unless expressly provided otherwise by the CWA. *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly

provided in this Act, the Administrator of the Environmental Protection Agency . . . shall administer this Act."). As the Fifth Circuit aptly observed:

> There is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in § 402(b) . . . . The statute's plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements.

American Forest and Paper Assoc., 137 F.3d at 298. The Ninth Circuit decision should not stand, because it does not allow EPA to satisfy its mandatory duties under the plain terms of the CWA.[6]

3. There is no indication in the legislative structure or history of the CWA that Congress intended for ESA § 7(a)(2) to override EPA's nondiscretionary duties under CWA § 402(b). Under the CWA, EPA is required to withdraw NPDES permitting authority from a state if that state is not in compliance with CWA § 402(b)(1)-(9). 33 U.S.C. § 1342(c)(3). The Ninth Circuit decision, however, imposes

---

[6] Even if the Court finds that the language of CWA § 402(b) and ESA § 7(a)(2) conflict, the mandatory language of CWA § 402(b) controls, because it more specifically describes EPA's obligations to transfer NPDES permitting authority to the states, and therefore prevails over the more general obligations set forth in ESA § 7(a)(2). *National Cable & Telecommunications Assoc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two."); *Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

the additional requirement that a state would have to comply with ESA § 7(a)(2), otherwise NPDES authority could not be delegated to the state. *Defenders of Wildlife*, 420 F.3d at 971. As a result of the Ninth Circuit's interpretation of the CWA and ESA, EPA could be required to withdraw approval of state programs that are not in compliance with the requirements of ESA § 7(a)(2) (even though those requirements apply only to federal agencies), because EPA is required to withdraw its approval of noncompliant state programs pursuant to CWA § 402(c)(3). *See* 33 U.S.C. § 1342(c)(3) (In order to approve withdrawal of a noncompliant state program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall withdraw approval of such program.") Thus, under the Ninth Circuit decision, if EPA does not insure ongoing state consultation with the ESA Services, EPA could be violating the ESA if it delegates NPDES authority to or fails to withdraw such authority from the state.[7]

---

[7] The Coalition does not concede that EPA's determination of whether to withdraw permitting authority under CWA § 402(c) is an "action" for purposes of ESA § 7(a)(2). However, as explained in section II, *infra*, claims are being made that EPA's determination of whether to withdraw permitting authority is an action that requires ESA § 7(a)(2) consultation. *See, e.g.*, *Oregon Natural Resources Council v. Hallock*, No. 02-1650-CO, 2006 U.S. Dist. LEXIS 87070, *1-2 (D. Or. Nov. 29, 2006); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act — Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 29 (Apr. 19, 2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf>. If claims such as these succeed and a court decides that EPA's withdrawal determination under CWA § 402(c) is a federal action for purposes of ESA § 7(a)(2), then the logic of the Ninth Circuit decision seems to indicate that EPA would be required to withdraw NPDES permitting authority from state-administered programs based on noncompliance with ESA § 7(a)(2).

Such an interpretation of ESA § 7(a)(2) is inconsistent with the CWA's "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ." such that "[i]t is the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of this Act." 33 U.S.C. § 1251(b); *see also Ouellette*, 479 U.S. at 489 (The states have a "strong voice in regulating their own pollution," and should play a major role in protecting and preserving their own natural resources.); Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995) (citing the CWA as an example of "cooperative federalism," whereby the states have been granted the primary responsibility of administering and enforcing the permit program in a way that fits their objectives). The legislative history of the CWA confirms Congress' expectation that the states would be the primary administrators of the NPDES permitting program. S. COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 92-414, at 71 (1971) ("It is expected that the States will play a major role in the administration of this program."). Congress accurately recognized that states possess the expertise to administer their own permit systems. *Id.* at 8 ("Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries."). During hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, EPA Assistant Administrator John R. Quarles, Jr. stated:

> We are proceeding with the program that is based on trying to relate it to the existing structure of the Federal-State partnership established under the [CWA] and that structure places in the States the primary firing line responsibility for dealing with polluters, gathering information as to water quality

> conditions in the State, and prescribing levels of treatment that should be required. The Federal role is a backup role and we are trying to be more vigorous in pursuing our own responsibilities but not distort them into a fundamentally different level of responsibility.

Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control, Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 92nd Cong. 4356 (1971). The conflict between the express policy and the Congressional intent of the CWA, and the Ninth Circuit decision demonstrates the unwarranted impact that the decision could have on the administration of the NPDES program and the CWA.[8]

4. If the Ninth Circuit decision is left to stand, there will be significant practical impacts on the current NPDES program. For example, in order to avoid a denial of new applications for a transfer (such as for the currently pending application submitted by State of Alaska), or a possible withdrawal of EPA's approval of current NPDES programs, states could be required to develop permitting programs that implement the provisions of ESA § 7(a)(2), despite the fact that the plain language of ESA § 7(a)(2) applies only to federal agencies. 16 U.S.C. § 1536(a)(2); *see also*, John H. Minan, *General Industrial Storm Water Permits and the Construction Industry: What does the Clean Water Act Require?*, 9 CHAP. L. REV. 265, 288 (2006) (In light of Ninth

---

[8] There is also no language in ESA § 7(a)(2) that would support the Ninth Circuit's imposition of that statute's requirements on the states. The unambiguous language of ESA § 7(a)(2) only applies to "[e]ach Federal agency," and not to a state or state agency. 16 U.S.C. § 1536(a)(2). As a result, the Ninth Circuit decision is inconsistent with the intent of ESA § 7(a)(2).

Circuit decision, "[t]o the extent that the EPA does not comply with the federal consultation provisions of the ESA in deciding to approve an NPDES permitting transfer to the state, such a transfer may be in legal jeopardy."). This required revision could have a sweeping effect on state NPDES programs, because states could be required to consult with the ESA Services on all actions under the NPDES program, including decisions on individual wastewater or stormwater permits. The imposition of a direct ESA § 7(a)(2) consultation requirement on the states would drastically hamper the states' ability to issue timely NPDES permits, because states would now be required to wait for assessments from the ESA Services, which would be burdened with handling consultation requests from 45 states, before issuing permits. Such delays will adversely affect the regulated community; increased delays will cause more uncertainty in planning to meet future discharge requirements, particularly if a renewed permit imposes more stringent discharge limits. Systematic delays in the NPDES system will substantially affect entities constructing new facilities or modifying existing facilities, because such facilities may not be able to begin discharging wastewater or stormwater (and as a result, in many cases, not be able to begin operations at all) until EPA or a delegated state agency issues a permit. Moreover, a lengthier development period for an NPDES permit will lead to increased transaction costs (such as for additional meetings with permitting agencies and possibly ESA Services, and additional data collection and assessments regarding endangered species) for obtaining a permit renewal.

In addition, as a result of the Ninth Circuit decision, EPA could now be required to determine whether state NPDES programs follow ESA § 7(a)(2), leading to EPA withdrawing its approval of the programs based on impacts to endangered species. Once EPA withdraws its approval of a state NPDES program under CWA § 402(c)(3), the permitting authority

for dischargers in that state would revert to EPA under CWA § 402(a). 33 U.S.C. § 1342(a). The withdrawal of approval for a state program and transfer of the NPDES permitting authority back to EPA would significantly affect the permitting process, because EPA would be required to shift its resources to handle a substantial increase in NPDES permitting applications and decisions currently handled primarily by the states. This result - centralizing permitting decisions with EPA - is exactly the result that Congress sought to avoid in passing CWA § 402(b), and EPA's resources could then be exhausted on permitting decisions, due to the comprehensive and time-consuming analysis that is required for NPDES permits. It is unlikely that EPA would be able to match the volume and timeliness of issuing NPDES permits that are now being issued by the 45 states, leading to longer administrative processes for issuing discharge permits and an increase in the backlog of outdated permits. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 192, n. 37 (2005) ("Threat of revocation, however, may be weakened by the EPA's lack of capacity to actually run permit programs in the states."). Further, EPA lacks the local expertise and knowledge of the state agencies regarding their own waterways and dischargers, and would therefore need to conduct additional analysis to gain such knowledge, further delaying the NPDES permitting process. The unjustified impact on EPA, state agencies, regulated entities and other stakeholders of transferring state NPDES programs back to EPA further demonstrates that the Ninth Circuit decision is inconsistent with the CWA.

II. ESA § 7(a)(2) DOES NOT OVERRIDE THE AUTHORITY OF FEDERAL AGENCIES TO PERFORM THEIR MANDATORY STATUTORY DUTIES.

1. Because the Ninth Circuit held that ESA § 7(a)(2) effectively overrides the mandatory duties of EPA, without a limitation that its decision applies only to CWA § 402(b), it appears that ESA § 7(a)(2) could override mandatory actions by any federal agency under other statutes. ESA § 7(a)(2) states that "[e]ach federal agency shall . . . insure" that its actions are not likely to jeopardize the continued existence of an endangered species "in consultation with and with the assistance of the" ESA Services. 16 U.S.C. § 1536(a)(2). As to CWA § 402(b), the Ninth Circuit decision would impose an ongoing ESA § 7(a)(2) consultation responsibility in addition to the nine elements of CWA § 402(b). The additional ESA § 7(a)(2) requirement, if enforced, will undermine state authority to administer the NPDES program. Indeed, there are already indications that the Ninth Circuit decision is eroding the NPDES permitting program as administered by the states; multiple challenges to NPDES decisions have been raised based on alleged noncompliance with ESA § 7(a)(2). *See Oregon Natural Resources Council v. Hallock*, No. 02-1650-CO, 2006 U.S. Dist. LEXIS 87070, *1-2 (D. Or. Nov. 29, 2006) ("Plaintiffs filed this citizen suit . . . alleging that defendants are violating the Endangered Species Act . . . by failing to initiate and complete formal consultation with the U.S. Fish and Wildlife Service (USFWS) in connection with the issuance of a National Pollutant Discharge Elimination System (NPDES) permit."); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act – Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 29 (Apr. 19,

2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf> ("Specifically, the lawsuit will allege that you and EPA have failed to initiate or complete formal consultation with NMFS regarding the effects of EPA's delegation of NPDES permit program authority to the State of Washington Department of Ecology and EPA's ongoing oversight, involvement, and funding of that program as required by the ESA.").

2. There is no indication that the Ninth Circuit decision will be limited to EPA's duties under CWA § 402(b) or the CWA generally. The opinion dissenting from the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit recognized the breadth of the decision below as potentially applying to ". . . *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). For example, under the federal Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. §§ 6901, *et seq.*), a state may seek "to administer and enforce a hazardous waste . . . program . . ." by submitting an application to EPA. 42 U.S.C. § 6926(b). EPA then decides whether the application satisfies three criteria. *Id.* If EPA approves a state application for administering a RCRA permitting program, then "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under" RCRA. 42 U.S.C. § 6926(d). Further, EPA has a continuing duty to determine whether a state is properly administering and enforcing a hazardous waste permitting program. 42 U.S.C. § 6926(e). If a state is not properly administering a program and corrective action is not taken, EPA "shall withdraw authorization of such program and establish a Federal program . . . ." *Id.* In light of the Ninth Circuit decision, EPA could be required to insure ongoing state consultation with the ESA Services under ESA § 7(a)(2) compliance before EPA can delegate RCRA

permitting authority to a state. As with NPDES authority under the CWA, a state could be required to demonstrate to EPA that its RCRA permitting programs comply with ESA § 7(a)(2) in order to maintain such a permitting program. Likewise, EPA could be required to withdraw its approval of a RCRA permitting program if a state does not implement procedures to demonstrate to EPA that it is in compliance with ESA § 7(a)(2). Currently, EPA has delegated RCRA permitting programs to 48 states, plus the District of Columbia, (*see* <http://www.epa.gov/epaoswer/hazwaste/state/stats/maps/keychrt.pdf>), all of which could revert to EPA if the Ninth Circuit decision is upheld.

Another example of a statute that could be affected by the Ninth Circuit's ruling is the federal Clean Air Act ("CAA") (42 U.S.C. §§ 7401, *et seq.*). Under the CAA, states were required to develop and submit to EPA a permit program within three years after the enactment of the CAA. 42 U.S.C. § 7661a(d)(1). If a state program was not approved within two years, EPA was required to administer a permitting program for that state. 42 U.S.C. § 7661a(d)(3). If a state has delegated permitting authority, EPA is then charged with a continuing duty to determine whether "a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of" the CAA. 42 U.S.C. § 7661a(i)(1) & (2). If EPA determines a state is not properly administering a permitting program, EPA is required to issue a notice to the state. 42 U.S.C. § 7661a(i)(1). If the state has not come into compliance with the CAA within 18 months after the notice is issued, EPA is required to impose sanctions. 42 U.S.C. § 7661a(i)(2) (". . . the Administrator shall apply the sanctions under section 7509(b)."). Under the Ninth Circuit decision, states could be subject to sanctions under the CAA for

noncompliance with ESA § 7(a)(2).[9] In addition, EPA is required to object to a proposed permit from a state "[i]f any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan . . . ." 42 U.S.C. § 7661d(b)(1) ("the Administrator **shall** . . . object to its issuance.") (emphasis added). Under the Ninth Circuit rationale, EPA could be required to object to CAA permits that are not issued in compliance with the provisions of ESA § 7(a)(2).[10]

Another example of a statutory provision that may be overridden by the Ninth Circuit decision is the state plan provision of the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 667. Under that provision, a state that "desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement."

---

[9] To date, 16 Clean Air Act programs have been fully approved by EPA, and the remaining 34 state programs have been approved on an interim basis. *See* <http://www.epa.gov/oar/oaqps/permits/approval.html>.

[10] As with the CWA, there is also evidence that ESA § 7(a)(2) is affecting the CAA permitting program. A challenge has been brought against a Prevention of Significant Deterioration ("PSD") permit based on alleged noncompliance with ESA § 7(a)(2). *See In re: Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, slip op. at 18-19 (Environmental Appeals Board, Sept. 27, 2006) (Petitioners challenged the Illinois Environmental Protection Agency's issuance of a PSD permit in part on the ground that the state agency failed to comply with the federal agency consultation requirements contained in ESA § 7.).

29 U.S.C. § 667(b). Once a state submits a proposed plan, the Secretary of Labor "**shall** approve the plan . . . if such plan in his judgment" meets eight criteria. 29 U.S.C. § 667(c)(1)-(8).[11] Like the other statutes provided above, if the Ninth Circuit decision is left to stand, the Secretary of Labor may have to disapprove a proposed state OSHA plan based on the effects that the plan would have on endangered species, despite the lack of any language in OSHA indicating that a plan could be denied on such a basis.

There are numerous other examples of mandatory statutory obligations that could be affected by the Ninth Circuit decision. *See e.g., Sierra Club v. Babbitt*, 65 F.3d 1502, 1509-11 (9th Cir. 1995) (The court held that ESA § 7(a)(2) consultation was not required for the approval of a logging road project because a right-of-way agreement between the Bureau of Land Management and timber company left no discretion to deny a permit to protect endangered species); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66-69 (D.D.C. 2003) (The district court found that the Bureau of Reclamation had certain nondiscretionary duties to build and operate dams under the Colorado River Compact of 1922, and, thus, was not required to consult under ESA § 7(a)(2) in performing those duties); *Strahan v. Linnon*, 967 F. Supp. 581, 607-608 (D. Mass. 1997) (Coast Guard's issuance of Certificates of Documentation and Inspection was a nondiscretionary duty, and, therefore, did not trigger ESA § 7(a)(2)).

If Congress had intended for ESA § 7(a)(2) to prevail over mandatory EPA duties, it could have explicitly stated so in the language of the CWA or the ESA. Absent such

---

[11] Like the CWA, one of the purposes of OSHA is to encourage "the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . ." 29 U.S.C. § 651(b)(11).

statutory language, ESA § 7(a)(2) should not be interpreted to effectively repeal mandatory EPA duties under the CWA. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) ("The intention of the legislature to repeal 'must be clear and manifest.'"). The Ninth Circuit decision impermissibly ignores the language and intent of the CWA and ESA, creating a sweeping and unwarranted effect on the regulated community, including Coalition members, that should not be left to stand.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

DANIEL P. ALBERS
Counsel of Record
FREDRIC P. ANDES
DAVID T. BALLARD
BARNES & THORNBURG
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606
(312) 357-1313

Counsel for the Federal Water Quality Coalition